8045 DUTY OF A PROPRIETOR OF A PLACE OF BUSINESS TO PROTECT A PATRON FROM INJURY CAUSED BY ACT OF THIRD PERSON

As the proprietor of a (tavern, etc.) who opens it to the public for his or her business purposes, (proprietor) had a duty to use ordinary care to protect members of the public while on the premises from harm caused to them by the accidental, negligent, or intentional acts of third persons if by using ordinary care, he or she could have discovered that the acts were being done or were about to be done, and he or she could have protected the (injured patron) by controlling the conduct of the third person or by giving a warning adequate to enable them (injured patron) to avoid harm. However, (proprietor) is not required to guarantee the safety of patrons against injuries inflicted by other patrons on the premises.

(If the nature of the particular business is such that the proprietor should expect a risk of harm to patrons by third persons, then he or she is under a duty to employ a reasonably sufficient number of employees to afford a reasonable protection.)

(A person who assembles a number of people upon his or her property for financial gain to himself or herself must use ordinary care to protect the individuals from injury from causes reasonably to be anticipated. This duty requires that the proprietor furnish a sufficient number of guards or attendants and take other necessary precautions to control the actions of the crowd.)

(It is for you to determine whether the guards furnished or the precautions taken were sufficient under all the circumstances.)

COMMENT

This instruction was approved in 1977 and numbered Wis JI-Civil 1027.5. It was renumbered in 1985 and revised in 1987. The comment was updated in 1998, 2010, and 2011.

Kowalczuk v. Rotter, 63 Wis.2d 511, 513-14, 217 N.W.2d 332 (1974); Weihert v. Piccione, 273 Wis. 448, 455-56, 78 N.W.2d 757 (1956); Radloff v. National Food Stores, Inc., 20 Wis.2d 224, 121 N.W.2d 865 (1963); Emerson v. Riverview Rink & Ballroom, 233 Wis. 595, 290 N.W.2d 129 (1940); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951); Lee v. National League Baseball Club, 4 Wis.2d 168, 89 N.W.2d 811 (1958); Beyak v. North Central Food Systems, Inc., 215 Wis.2d 64, 571 N.W.2d 912 (Ct. App. 1997); Restatement, Torts §§ 346, 348 (1934).

This instruction would apply where the business is a place of amusement.

Premises. In Delvaux v. Vanden Langenberg, 130 Wis.2d 464, 487, 387 N.W.2d 751 (1986), the Wisconsin Supreme Court said that a tavern owner's duty does not extend beyond his business premises. For cases discussing the "premises," see Symes v. Milwaukee Mutual Ins. Co., 178 Wis.2d 564, 505 N.W.2d 143 (Ct. App. 1993) and Flynn v. Audra's Corp., 2010 AP 882 (2011).

Contribution and Indemnification: A negligent tortfeasor may have a claim for indemnification against an intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Threshermen's Mutual Insurance Company, 131 Wis.2d 123, 388 N.W.2d 908 (1986). An intentional tortfeasor is not entitled to contribution from a negligent tortfeasor. Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 436 N.W.2d 311 (1989), reversing in part and remanding 141 Wis.2d 114, 414 N.W.2d 57 (Ct. App. 1987).

Cases Involving Joint Tortfeasors and Intentional and Negligent Conduct. Where the jury finds that the third person's wrongful act is an intentional tort and further finds the proprietor negligent, both would be jointly liable to the plaintiff. However, negligence-comparison principles would not allow their conduct to be compared. Wis. Stat. 895.045(1) provides only for comparison of negligent conduct. Also see Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 151, 384 N.W.2d 692 (1986), Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960); Fleming, supra.

Also, a negligent tortfeasor may claim indemnification from a joint intentional tortfeasor should their concurrent conduct produce damage or injury. Fleming v. Threshermen's Mutual Insurance Company, et al, 131 Wis.2d 123, 130, 388 N.W.2d 908 (1986). An intentional tortfeasor has no claim for contribution from a joint negligent tortfeasor. Fleming, supra, p. 129, Imark Industries, Inc. v. Arthur Young & Company, 148 Wis.2d 605, 619-620, 436 N.W.2d 311 (1989).

For a sample verdict for use in cases involving intentional and negligent acts by joint tortfeasors, see Wis JI-Civil 1580 (comment).